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Nos. 81-2245, 81-2276 and 82-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEVADA,
Petitioner
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner
v.
TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT CONDITIONAL MOTION FOR LEAVE TO FILE POST-ARGUMENT MEMORANDUM, AND JOINT POST-ARGUMENT MEMORANDUM, FOR PETITIONERS IN NOS. 81-2245 AND 81-2276

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Pursuant to Rule 35.6 of the Rules of this Court, the Petitioners in Nos. 81-2245 and 81-2276 move for leave to file the annexed Post-Argument Memorandum, if the Court grants the Motion of the United States for leave to file its own Post-Argument Memorandum.

Last Friday, May 6—nine days after the Oral Argument in the above-entitled cases—the United States filed a Motion for Leave to File Post-Argument Memorandum and a thirteen-page "memorandum," or brief, in the above-entitled cases. While we do not believe there is anything in the Solicitor General's Memorandum which warrants further consideration by the Court, his statements, if considered, should read in conjunction with these brief additional comments.

Therefore, if the Court grants the Solicitor General's Motion and considers his Memorandum, we respectfully move the Court to accept the enclosed Memorandum as our response thereto.

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JOINT POST-ARGUMENT MEMORANDUM FOR PETITIONERS IN NOS. 81-2245 AND 81-2276

This Memorandum is submitted in response to the Post-Argument Memorandum for the United States.

1. The United States argues that this case "does not call for resolution of the rights of landowners on the Newlands Project under their individual water contracts with the United States * * *." Memo at 2. To the contrary, if the Ninth Circuit is affirmed, the Tribe will be free to assert a fishery right with an 1859 priority which will divert water away from the Newlands Project and into Pyramid Lake. If the Government and the Tribe succeed here, a majority of the water in an average year and all of the water in a dry year will be diverted away from the Newlands Project. The net result will be the extinguishment of the rights of landowners on the Newlands Project.

2. The Government argues that the Tribe and the Newlands Project landowners were not parties to *Orr Ditch*, and "the respective rights they seek to have recognized and protected in this case" were not adjudicated in *Orr Ditch*. Memo at 3-4. But both the Indians and the landowners were clearly in privity with the United States, which in turn *was* a party in *Orr Ditch*, and, as the Court of Appeals recognized, res judicata applies to privies as well as parties. Nev. App. 226a n.11, 227a. Moreover, the *Orr Ditch* Final Decree specifically applied not only to parties, but to their servants, agents, attorneys, assigns "and all persons claiming by, through or under them and their successors * * *." Nev. App. 145a. Finally, both the District Court and the Court of Appeals held that this is the same cause of action as that asserted in *Orr Ditch*. Nev. App. 188a, 224a-226a; *see* Nev. (No. 82-38) Br. at 9-24.

3. The United States argues that its rights, as contrasted with the "non-federal" rights, were never decreed with precision, and that the Final Decree in *Orr Ditch* awarded the United States "only an *aggregate* right" to maximum, not minimum, amounts for the Newlands

Project lands. Memo at 4-7; emphasis in original. It contends that because it was decreed only a maximum amount, it is now free to reallocate some (or presumably all) of the decreed Project entitlement to non-project purposes. This argument must fail for several reasons.

First, the Final Decree did in fact award a specific amount for Newlands based upon a 3.5 or 4.5 acre foot duty for land irrigated. Nev. App. 59a.[1]

Second, the United States' decreed right can accurately be described as "aggregate" only in its failure to identify each individual project farmer and quantify his or her individual entitlement. The project right is *not*, however, aggregated or lumped together with the Reservation right or any other federal claim. In fact, it was carefully and correctly distinguished from every other federal right in the Decree in language which makes clear that the entitlement was limited to project lands and purposes:

> * * * the plaintiff is entitled and allowed to divert, with a priority of July 2, 1902, *through the Truckee Canal* 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands *on the Newlands Project*, for storage *in the Lahontan Reservoir*, for generating power, for supplying the inhabitants of cities and towns *on the project* and for domestic and other purposes, and under such control, disposal and regulation as the plaintiffs may make or desire * * *. [Nev. App. 59a; emphasis added.]

Water diverted through the Truckee Canal or stored in the Lahontan Reservoir is simply physically unavailable

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[1] The United States states in a footnote that since an average of 215,000 acre feet of water already flows into Pyramid Lake, this amount, in effect, will not have to be disturbed. Memo at 2 n.2. What the United States fails to note is that if the United States is successful here, this amount will receive a priority of 1859, and, in dry years, this amount plus half of the water now going to Newlands will entirely be diverted to the Lake.

for rediversion to Pyramid Lake. And the repeated reference to use "on the project" makes it clear that the United States is not free to reallocate this water at will to non-project lands for non-project purposes to the detriment of project farmers, as it contends.

Third, the project farmer became the owner of the water right appurtenant to the project land when that land and water right were purchased from the United States, as *Alpine* specifically held. Nev. Reply Br. at 5 & n.8; TCID Reply Br. at 1-5.[2]

Finally, the fact that the United States cannot simply divert Newlands water to the Reservation is shown by the fact that the United States brought this suit to obtain a *Winters* reserved right with an 1859 priority for between 375,000 and 400,000 acre feet of water per year for fish flows in the Lower Truckee River and for Pyramid Lake. If the United States was privileged to do with the water as it pleased, it did not need to bring this lawsuit to obtain that right. Obviously, the unique argument made by the United States is an afterthought, for it was not made to any of the courts below.

4. The United States argues that the Newlands landowners are charged with knowledge of the Government's alleged conflict of interest and cannot disassociate themselves from it. Memo at 11-12. This argument is wholly inconsistent with the trial court's finding of fact, specifically upheld by the Court of Appeals, that the *Orr Ditch* defendants, to whom this *same information* was

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[2] The United States refers to a 3.0 acre feet per acre limitation on Newlands water in some of the contracts with the landowners and then, in a footnote, notes that this restriction has been held illegal in a "plainly incorrect" holding by the Ninth Circuit in *Alpine*. Memo at 7 n.5. What the United States fails to tell the Court is that the time for seeking certiorari in the *Alpine* case has passed, and the Government has *not* applied for review of decision, even though the Tribe has separately sought intervention in this Court and certiorari in that case.

available, were unaware of any such conflict. Nev. App. 191a, 238a.[3] Further, there is no evidence that the project farmers ever saw or heard of the Reservation documents or the fishing trespass case, or that they were familiar with the decline of the fishery to an extent greater than anyone else or at all. The United States has not cited, nor could it, any additional information which would have given the project any greater awareness of the Government's "wholly internal" deliberations than was enjoyed by the non-project landowners. Nev. App. 191a. The project farmers were good faith purchasers of land and appurtenant water rights from the Government and were unaware of any alleged breach of fiduciary duty by the Government.

Even assuming that the knowledge of the Government could be imputed to the non-client landowners—a proposition unsupported by the cases cited by the Goverment—the question is: Knowledge of what? What knowledge can be imputed to the Newlands farmers when the Government itself did not discover its alleged conflict until more than 30 years after the entry of the Final Decree? The record is clear that the Government, during *Orr Ditch*, never thought there was any conflict of interest—because, in fact, none existed—and, therefore, there was no knowledge to impute.[4]

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[3] The Newlands Project was listed under the defendants in the Final Decree. *See* Nev. Reply Br. App. B.

[4] The Government purports to quote the District Court to the effect that there was such a conflict. Memo at 12. The District Court, however, was very careful to distinguish between a "conflict of interest"—which it found not to have existed—and a "conflict of purpose." Nev. App. 189a. The District Court referred to a conflict of purpose when discussing the Government's dual responsibility of seeking reclamation water for Newlands and a *Winters* right for the Tribe. But the Government thereafter fulfilled each of its responsibilities when it sought water *both* for Newlands and for the primary purpose of the Reservation: to convert the Indians from their nomadic habits into husbandry and agriculture, and thus afford them enough water for irrigation.

5. We note that under the Government's interpretation of the Tucker Act, a remedy by the landowners would be either nonexistent or drastically restricted. In contrast, the United States has already provided a remedy for the Tribe. *See* TCID (No. 82-38) Br. at 31-34. Moreover, businesses, cities and thousands of individuals other than the Newlands farmers have developed a regional economy and society in reliance on the continued existence of agriculture in the Project and would be left with no remedy if the United States' position were accepted.

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